

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-2022
[2013] NZHC 1886**

BETWEEN

LYALL GRAEME THURSTON
Plaintiff

AND

COLLEEN ELIZA THURSTON AND
JEREMY JAMES MALLABY
GOODWIN
Defendants

Hearing: 25, 26 and 27 February and 1 March 2013

Appearances: V T Bruton and D M Urmson for Plaintiff
A H Waalkens QC for C E Thurston
G M Harrison for J J M Goodwin

Judgment: 26 July 2013

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 26 July 2013 at 4 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Solicitors: TGT Legal, Auckland

Counsel: A H Waalkens QC, Auckland
G M Harrison, Auckland

Introduction

[1] This is an application by the Plaintiff to remove the Defendants (“Mrs Thurston” and “Mr Goodwin” respectively) as trustees of the Thurston Family Trust (“trust”). There are four trustees. The Plaintiff and his three sons are beneficiaries of the trust, as is Mrs Thurston.

[2] At the outset of the trial, the Plaintiff sought leave to amend his statement of claim, to include an application to remove Mrs Thurston as executor and trustee of the estate of Mr Graeme Thurston (deceased) (“estate” and “Mr Thurston”).¹ For their part, the Defendants sought leave to cross claim for an order removing the other trustees of the trust, namely Ms B Gorinski and Mr J S Burrett.

[3] I granted leave to amend to both parties but declined to allow either to proceed on the fresh causes of action in the hearing before me. Counsel for Mrs Thurston had no prior notice of the Plaintiff’s new cause of action, and the Defendants had not served their cross claim on Ms Gorinski or Mr Burrett, neither of whom was represented.

[4] The Plaintiff’s application to remove the Defendants as trustees is made under s 51 of the Trustee Act 1956 (“Act”), and in the alternative seeking the exercise of the inherent jurisdiction of the Court.

[5] In his statement of claim the Plaintiff alleges that it is expedient to remove the Defendants as trustees because:

- (a) administration of the trust is deadlocked;
- (b) the trustees are unable to make unanimous decisions or any decisions at all;
- (c) Mrs Thurston is acting in and motivated by her own personal interests, not the interests of all beneficiaries; and

¹ Administration Act 1969, s 21.

- (d) Mr Goodwin is a “close confidante” of Mrs Thurston, he supports her position and is in breach of his duty to act even-handedly in the interests of all beneficiaries.

Principles

[6] Section 51 of the Act confers power on the Court to remove a trustee if the Court is appointing a new trustee. No such appointment is sought in the present case and, accordingly, s 51 has no application.

[7] There is no dispute that the Court has inherent jurisdiction to control a trust and that it may remove a trustee in the exercise of that jurisdiction. Counsel referred me to *Letterstedt v Broers*, *Miller v Cameron* and *Hunter v Hunter*² as leading cases regarding the nature of the jurisdiction and as to the circumstances in which the Court has ordered the removal of a trustee in the exercise of that jurisdiction. The relevant passages from *Letterstedt v Broers* are as follows:³

But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

² *Letterstedt v Broers* (1884) 9 App Cas 371 (PC); *Miller v Cameron* (1936) 54 CLR 572 (HCA); and *Hunter v Hunter* [1938] NZLR 520 (CA).

³ *Letterstedt v Broers*, above n 2, at 385-386.

[8] These passages were cited with approval by the Court of Appeal in *Kain v Hutton*,⁴ in which the Court said:

[18] The inherent jurisdiction is derived from the Court's general supervisory powers in equity relating to the supervision of trusts for the welfare of beneficiaries. The relevance of that objective is recognised in well-known cases such as *Letterstedt v Broers* (1884) 9 App Cas 371 and *Hunter v Hunter* [1938] NZLR 520.

[19] The circumstances in which a Court will exercise its power to remove trustees are authoritatively and conveniently summarised in the speech of Lord Blackburn in *Letterstedt v Broers*, supra, at pp385-86 [see above] which we now cite, as did Panckhurst J. ...

[9] It follows from *Letterstedt* that the Court's principal duty is to see that trusts are properly executed and that the Court's main guide is the welfare of the beneficiaries.

[10] Counsel for the Defendants submitted that the Court ought to act cautiously in making an order to remove a trustee, and that friction and dispute between trustees or between one or more trustees and a beneficiary is insufficient to warrant removal.

[11] I am satisfied that the Defendants have failed to act impartially as between all beneficiaries and that the proper execution of the trust requires that the Defendants be removed as trustees. There is friction and dispute between the trustees and between the Defendants and the Plaintiff and in my view much of it arises from the failure of the Defendants to which I have referred. In particular, I consider that Mrs Thurston has been unable to keep separate her duties as a trustee from her interests as a beneficiary. I am also satisfied that Mr Goodwin is so closely aligned to Mrs Thurston's interests as a beneficiary of the trust that he has not acted impartially as between all beneficiaries and that he cannot so act. This case cannot be described as one of friction and dispute arising for insufficient reason. I am satisfied that it is necessary to make the orders that the Plaintiff seeks.

[12] In submissions, counsel for the Plaintiff said that I might consider that there were grounds to remove Ms Gorinski and/or Mr Burrett as trustees and that, if I did,

⁴ *Kain v Hutton* CA23/01, 25 July 2002.

I should make an order that they complete all outstanding financial statements before retiring.

[13] An order for the removal of Ms Gorinski and/or Mr Burrett would be a matter for consideration at the hearing of the Defendants' cross claim. However, having regard to the evidence before me as to the administration of the trust since 2010 and the differences which have arisen between the four trustees, it may well be desirable that new trustees be appointed in place of Ms Gorinski and/or Mr Burrett.

Evidence

[14] The Plaintiff, each of his three sons, each trustee, Mr John Steer, a chartered accountant, and Mr Michael Chamberlain, an actuary, gave evidence by way of affidavit. With the exception of the Plaintiff's three sons, each was cross-examined. There is no real dispute about the facts of the case or the principles to be applied. The issue is whether the circumstances are such that it is necessary or expedient to remove the trustees.

Background

[15] The Plaintiff is the son of Mr Thurston and Esther Thurston (deceased, "Esther"). Mr Thurston and Esther separated in or about 1975 and divorced in 2000. Esther died in 2008.

[16] Mr Thurston and Mrs Thurston commenced a de facto relationship in or about 1975 and were married in 2003.

[17] Mr Thurston owned and/or controlled the majority stake in various business interests which were sold in 1983 for approximately \$17 million. The Plaintiff held the beneficial interest in a share of the business, for which he was paid \$800,000.

[18] In the late 1980s Mr Thurston purchased residential properties in Auckland and at Sanctuary Cove on the Gold Coast, Australia ("Auckland property" and "Sanctuary Cove" respectively).

[19] Mr Thurston settled the trust by deed of trust dated 12 September 2003 (“trust deed”). The original trustees of the trust were Mr Thurston, Ms Gorinski and Mr Burrett. They remained the trustees until Mr Thurston died in 2010.

[20] In 2004 Mr Thurston transferred various investments and the Auckland property to the trustees. The consideration for the transfer was not in evidence but as at the date of Mr Thurston’s death the debt that the trust owed to him for the transfer of assets was approximately \$9 million.

[21] In 2005 Mr Thurston had a severe stroke and he was in failing health thereafter.

[22] Mr Thurston executed a memorandum of wishes to the trustees dated 26 August 2010 in which he set out his wishes concerning the trust and which he asked his trustees to take into account in their administration and management of the trust. I refer to this memorandum below.

[23] Mr Thurston died in September 2010 leaving a will dated 14 August 2009 (“will”). Probate of the will was granted to his executors on 8 December 2010. Mrs Thurston, Ms Gorinski and Mr Burrett are the executors and trustees of the will (“executors”). Mr Goodwin is the estate’s solicitor and he has also acted for the trust.

[24] In his will, Mr Thurston left Mrs Thurston a legacy of \$2 million and Sanctuary Cove; the Plaintiff a legacy of \$200,000; the Plaintiff’s three sons \$450,000 between them, subject to each attaining 30 years of age; and charitable bequests totalling \$85,000. The Plaintiff’s sons are in their 20s.

[25] Mr Thurston held a power of appointment of trustees of the trust. He exercised that power in his will to appoint Mrs Thurston and Mr Goodwin as trustees of the trust.

[26] In his will Mr Thurston forgave the debt due from the trust, subject to the executors seeking repayment of such sum as might prove necessary to administer the

estate and meet their obligations under the will. Mr Thurston then directed that the residue of his estate be transferred to the trustees of the trust, to be held upon the terms of the trust deed.

[27] On Mr Thurston's death and by notice dated 17 November 2010, Mrs Thurston elected option B pursuant to s 61(1) Property (Relationships) Act 1976 ("PRA"). A surviving spouse who elects option B elects not to make an application for the division of relationship property but, in a case such as the present, to receive as a beneficiary under the will of the deceased spouse.

[28] By letter dated 8 June 2011 the Plaintiff and his sons gave notice to the executors that they would seek further provision from the estate pursuant to the Family Protection Act 1955 ("FPA"). The Plaintiff and his sons commenced these proceedings in December 2011. The Plaintiff also made, but has discontinued, an application for recall of probate. For her part, Mrs Thurston has cross-claimed in the FPA proceedings for further provision, has applied to set aside her election of option B and to elect option A instead and has applied for division of the relationship property.⁵ All of these proceedings are presently before the High Court.

[29] Counsel for the Plaintiff was critical of Mrs Thurston's application to set aside her election of option B and elect option A. Counsel also submitted that recent suggestions by Mrs Thurston as to how differences between the parties might be resolved were further evidence of a conflict of interest. I have not found it necessary to consider these matters in deciding this application. It suffices to say that s 69(2)(iv) PRA anticipates that a surviving spouse may seek to set aside their earlier election if a third party seeks provision from the deceased's estate pursuant to the FPA.

[30] Much also was made of an agreement between Mr and Mrs Thurston for "mutual wills" and whether the relevant part of Mrs Thurston's will was in keeping with that agreement. I have not found it necessary to consider that matter either in deciding this application.

⁵ Property (Relationships) Act 1976, s 69.

Parties

[31] It is necessary to say more about some of the parties and witnesses.

[32] The Plaintiff is in his early 60s. The Plaintiff's sons are in their 20s and all are employed. The eldest son, Simon, is paralysed from the waist down and uses a wheelchair. In giving evidence the Plaintiff said that he and his wife have dedicated themselves to Simon and the wider community of families in New Zealand with physically disabled children.

[33] Ms Gorinski is an investment manager. Ms Gorinski met Mr Thurston whilst employed at a bank as a customer service and lending manager and subsequently as an investment adviser in the bank's products. Ms Gorinski subsequently established a financial and investment firm with Mr Steer, the chartered accountant to whom I referred above.

[34] Mr Burrett is retired but was an insurance broker in his working life. Mr Burrett and Mr Thurston were close friends, having become acquainted as a result of their wives' friendship.

[35] Mr Goodwin became Mr Thurston's solicitor in 2001 and commenced acting for Mrs Thurston in 2005. Mr Goodwin is also a trustee of two trusts settled by Mrs Thurston and acts for those trusts. In giving evidence, Mr Goodwin agreed that there was a close professional friendship between him and Mrs Thurston and said that she was a "significant" client of his practice.⁶

[36] Mr Steer is Ms Gorinski's business partner and together they operate Portland Investment Management Limited ("Portland"). Mr Steer's evidence is that Portland had a long association with Mr Thurston which included managing Mr Thurston's personal investments, preparing financial statements and tax returns for the trust and preparing tax returns for Mr Thurston.

[37] Mr Steer completed financial statements for the trust for the six months to 30 September 2010. Mr Steer gave evidence as to difficulties Portland encountered

⁶ Notes of Evidence at 226.

completing the accounts for the trust for the year ended 31 March 2011, two of those difficulties being (on Mr Steer's view of it) a lack of information as to the proper payer of some fees charged by Mr Goodwin's firm and a lack of information as to payments that Mrs Thurston had made in respect of the Auckland property and for which she sought reimbursement. After what appears to have been considerable toing and froing, the trustees signed the financial statements for the year ended 31 March 2011 on or about 26 June 2012. Mr Steer's evidence was that these financial statements:⁷

... were unusually expensive to complete because of the delays in provision of various information, the fact that I had to make certain assumptions to move matters forward, and then had to review those assumptions and adjust the figures once the correct information was finally provided.

[38] As at the date of giving evidence, Mr Steer had sought but not received the information required to complete the financial statements for the estate to 31 March 2011.⁸ He gave evidence that he could not complete the trust's financial statements to 31 March 2012 until those statements for the estate were completed.

[39] Mr Chamberlain was called by the Plaintiff as an expert actuary and he gave detailed evidence on a range of matters. It is not necessary for me to comment on those matters in detail other than to say that Mr Chamberlain's evidence, which I accept, was that the structure of the trust's investments requires careful consideration and particularly so given the different ages and requirements of the beneficiaries and the present economic conditions. On the evidence before me, it did not appear that the trustees had given those investments the careful consideration to which Mr Chamberlain referred. Mr Chamberlain's evidence was that the current economic environment can be characterised as one of low interest rates, low economic growth and elevated unemployment and that at present there is no prospect of any improvement at least on the first two matters.

Trust

[40] The trust assets comprise investments and the Auckland property. The face value of the investments was \$7,375,460 as at 31 January 2013. The current market

⁷ Affidavit of J D Steer sworn 2 October 2012, at [25].

⁸ Ibid at [27].

value of the Auckland property is in the vicinity of \$6 million, this value reflecting substantial works undertaken in 2011. As is apparent from what follows, the nature, extent and cost of the works undertaken have been a cause of considerable dispute, both amongst the trustees and between the trustees and the Plaintiff.

Classes of beneficiaries of the trust

[41] There are two relevant classes of beneficiary. Mrs Thurston is the “Group A Beneficiary” and as such has a life interest in the “Group A Fund”. The Group A Fund comprises \$2.5 million and the Auckland property or any property purchased in substitution for it. The trustees are required to hold the income derived from the Group A Fund for Mrs Thurston and to permit her to have the use of any items of real property in the Group A Fund for the remainder of her life.

[42] The relevant provisions of the trust deed are as follows:

- 3.3 In the event that the Group A Beneficiary survives the Settlor it is agreed between the Settlor and the Trustees that the Trustees shall set aside the following assets or property of the Trust Fund (“The Group A Fund”) for the benefit of the Group A Beneficiary during the remainder of her lifetime.
- (a) The sum of **TWO MILLION FIVE HUNDRED THOUSAND DOLLARS.**
 - (b) The [Auckland property] or any property purchased in substitution for it (“The Substitute Property”). The Substitute Property acquired for the use of Group A Beneficiary may itself be sold and another property purchased in its place and the Trustees may exercise this discretion on more than one occasion during the Trust Period.
 - (c) Any surplus between the net sale proceeds of [the Auckland property] and the purchase cost of the Substitute Property shall be invested as part of the Trust Fund and not the Group A Fund with such income from it as shall be necessary for the upkeep and maintenance of the Substitute Property and any other real property occupied by the Group A Beneficiary which was acquired or held by the Settlor during his lifetime being applied for that purpose by the Trustees.
 - (d) Any other sums or items of property the Trustees and the Settlor agree in writing are to be classified as part of the Group A Fund.

The Trustees are to hold the income derived from the Group A Fund for the Group A Beneficiary and to permit her to have the use of any items of real property in the Group A Fund during the remainder of her life.

[43] There is no evidence of any other sums or items of property falling within clause 3.3(d) of the trust deed.

[44] The Plaintiff and his sons fall within the class of “Group B Beneficiaries”. This class comprises the issue of Mr Thurston and Esther’s marriage, through all degrees, whether living as at the date of settlement or born during the trust period. The trust period is defined as the period beginning with the date of the trust deed and ending on the Date of Distribution, which in turn is the 80th anniversary of the date of the deed or such earlier date as the trustees might adopt by resolution in writing. Accordingly, this class of beneficiaries is not closed.

[45] The definition of beneficiaries also includes any other person, group of persons or body appointed by Mr Thurston or by the trustees after his death, or any charity nominated by Mr Thurston during his lifetime. No such appointment or nomination was or has been made.

Trustees’ powers

[46] As I have said, the trustees are required to hold the income derived from the Group A Fund for Mrs Thurston and to permit her to have the use of any items of real property in the Group A Fund for the remainder of her life. Subject to that, the trustees have power to pay or apply the whole or any part of the capital or income of the trust fund for the maintenance education or advancement or otherwise for the benefit in life of any beneficiary.

[47] Clause 4.1 of the trust deed provides that on the Date of Distribution the trustees shall hold the trust fund upon trust for such beneficiary or beneficiaries and in such shares as they appoint. Failing appointment the trust is to be held in equal shares for such of the issue of Mr Thurston as are living at the Date of Distribution.

[48] Clause 10.1 of the trust deed provides as follows:

10.1 Other Trustees: Any power or discretion vested in the Trustees may be exercised in favour of a Trustee who is also a Beneficiary by the other Trustee or Trustees.

[49] Clause 12.12(a) of the trust deed provides as follows:

12.12 (a) Wherever by this deed a discretion is conferred upon the Trustees, that discretion may be exercised only by resolution in writing signed by all of the Trustees and recorded in the Trustees' minutes.

[50] Clause 12.13 (b) of the trust deed provides as follows:

12.13 Any Trustee shall be entitled to act as Trustee and to exercise all of his powers and discretions despite the fact that:

...

(b) The interests or duty of such Trustee in any particular matter may conflict with his duty to the Trust Fund or any Beneficiary; or

Trustees

[51] There are to be no fewer than two trustees. At least one must be a professional trustee within the definition of the trust deed.⁹ Trustees must act unanimously, there being no provision for a majority decision.

Memorandum of wishes

[52] I referred above to Mr Thurston's memorandum of wishes dated 26 August 2010. In his memorandum, Mr Thurston set out his primary purpose in setting up the trust, to which I refer below. Mr Thurston then set out his wishes regarding the management of the trust fund (income and capital), particularly regarding the Plaintiff and his sons.

[53] The paragraphs of the memorandum of wishes that are particularly relevant in this case and which I have considered are as follows:

4. My primary purpose in setting up the Trust was to provide specifically for my wife, [Mrs Thurston] in the event I died before her to that intent I created a Group A Fund within the Trust, its terms are specified at clause 3.3 of the Trust Deed.

⁹ Trust Deed of the Thurston Family Trust 12 September 2003, cl 6.2(a).

5. The Group A Fund I suggest is administered as follows:
 - (a) The sum of \$2,500,000.00 is invested to produce an income for [Mrs Thurston], and a monthly allowance is provided to her equivalent to the net income after tax.
 - (b) The [Auckland property] is to be maintained by the Trust.
 - (c) In accordance with the terms of clause 3.3(c) of the Trust Deed, the trustees are to maintain any substitute property that is purchased and the property held by me at the property at [sic] Sanctuary Cove held by me shall be maintained from the Trust fund.

...
6. I intend that you shall have full discretionary power to specify a final vesting date for the Trust even though it may be in the interests of some beneficiaries or some future beneficiaries to conserve the Trust fund for a longer period of time.
7. Without making a binding direction, I suggest that you consider specifying the vesting date and making final distribution of the Trust when our youngest grandchild CHRISTIAN THURSTON has reached 50 years of age, and only if both [Mrs Thurston] and [the Plaintiff] have died.
8. My general wishes regarding administration of the Trust fund apart from the Group A Fund is that:
 - (a) The programme of charitable gifting I have maintained during my lifetime supporting the Salvation Army, the SPCA, the Arthritis Foundation, Heart Foundation and Stroke Foundation should be maintained by my trustees at a similar level to that I have maintained in my lifetime which I estimate at \$2,000.00. On final distribution of the Trust Fund I suggest that 10% of the capital be allocated to charitable trusts registered under the Charities Act 2006.
 - (b) Income distributions should be made available for education, health, general welfare, maintenance and well-being of the beneficiaries, as a guide you should aim to reinvest at least 50% of income after each tax year.
 - (c) Distributions from the Trust fund should be made to support my grandsons by way of capital advances which should be used for:
 - (i) Acquisition of a home;

...
10. I confirm discussions held with my co-trustees regarding the provision I made for [the Plaintiff] through his participation in the

sale of my business interests which I consider to be adequate for his personal needs.

Trustee meetings

[54] As a general rule the trustees met monthly after Mr Thurston's death. Minutes of trustee meetings are in evidence. These minutes also record the executors' discussions in respect of the estate. In the main Ms Gorinski prepared these minutes and some were approved by the trustees as being an accurate record of discussions. From time to time Mr Goodwin also circulated minutes he had prepared. However, there is no real dispute as to the facts or that Ms Gorinski's minutes record the gist of what was discussed and agreed, at least on matters relevant to this decision.

Discussion

Works to the Auckland property

[55] Mr and Mrs Thurston lived in the Auckland property until Mr Thurston's death. Mrs Thurston continues to live there. It is common ground that at the time of Mr Thurston's death some maintenance and refurbishment of the property was required.

[56] What has been controversial however are works that Mrs Thurston instructed should be undertaken to the Auckland property, without the prior approval of the trustees but at the expense of the trust. During the hearing I was provided with a document setting out what was believed to be the cost of the works. These costs totalled approximately \$875,000, and in the main were paid from the trust's capital, thereby inevitably affecting the income and, in due course, probably the capital of the trust.

[57] I heard much evidence regarding the works to the Auckland property, the disputes between the trustees caused by those works and the impact of their cost on the trust fund. It is sufficient, however, for me to record the following.

[58] The minutes of a meeting of trustees on 2 February 2011 record that Mrs Thurston had engaged an architect to complete a programme and costing of works to be done at the Auckland property. The next meeting of trustees was held on 8 March 2011. The minutes for that meeting, subsequently approved, anticipate renovation and repair of two bathrooms and the replacement of some appliances. The minutes also record the presentation of reports from an architect and quantity surveyor and that the:¹⁰

... extent and values (estimated) came as a bit of a surprise. With short notice of receipt it was agreed that time to absorb this would be required before further discussion. It was agreed [Mrs Thurston] approach [the architect] for firm quotes for the work and to liaise with Grant the builder with these. ...

[59] The reports referred to in the passage I have just quoted were not in evidence but the evidence was that the works were estimated to cost approximately \$450,000.

[60] The (approved) minutes of a meeting of trustees in April 2011 record concern at the cost of the proposed works. Mrs Thurston advised the other trustees that the works had commenced, despite the agreement reached at the previous meeting. The minutes record agreement that the works not be further advanced pending trustees' approval. Mrs Thurston did not, however, instruct the builders to stop work.

[61] The trustees also agreed at the meeting that a valuation should be obtained as to the current market value of the Auckland property and its expected market value on completion of the works. Gardner Valuations Limited provided their valuation to Mr Goodwin dated 28 April 2011. Their opinion was that the market value of the Auckland property on completion of the works would be exactly \$1 million more (including GST, if any) than in the absence of the works.¹¹

[62] Mr Burrett gave evidence that, at Mrs Thurston's request, he attended at the Auckland property on 12 April 2011. Mrs Thurston's request followed the discovery of the failure of a wall. Mr Burrett subsequently sent an email to Ms Gorinski and Mr Goodwin on 13 April 2011, which email included the following statements:¹²

¹⁰ Affidavit of J S Burrett sworn 25 May 2012, Exhibit "A" at 9.

¹¹ Affidavit of J J M Goodwin sworn 17 August 2012, Exhibit "A" at 3.

¹² Affidavit of J S Burrett sworn 25 May 2012, Exhibit "A" at 12.

... The interior of the house has had a number of rooms gutted.

Mainly all service areas. Three bathrooms, one Laundry and the Kitchen have been stripped back to bare timber wall framing ...

I took some time walking around with Grant the Builder who does seem genuine in his work ethic (but who wouldn't be when there is no plan or work description and this will go on for a LONG TIME). He voiced concern that he had had no plans or drawings from the Architect who swanned in and out and next week was off to Australia so he was just charging on with putting the place back together. ...

Now as I see it there are issues which need confronting.

- 1) Firstly work has proceeded when the Trustees clearly have not given a mandate.
- 2) The Architect is bowling along and we have not agreed on what terms. Has anyone signed an instruction and Scope of work? ...
- 3) [Discusses kitchen]. ...

[63] The next meeting of trustees was on 10 May 2011. By this time the trustees had the valuation to which I have referred. Ms Gorinski's minutes record agreement that the works were "at the point of no return" and that the trustees agreed that they should be completed in accordance with the architect's report at the "preliminary" costing of \$450,000 plus GST. Mr Goodwin's minutes of the same meeting record an additional \$150,000 plus GST budgeted for "exterior and interior painting", and that the costs were to be funded from "accumulated cash deposits and asset sales once cash expended".¹³

[64] The minutes of a meeting of trustees on 12 July 2011 include the following:¹⁴

... There is progress being made on the renovations. [Ms Gorinski] had been taken by surprise re the cost of the painters. This raised an uproar by [Mrs Thurston], especially when [Mr Burrett] thought pricing may be a bit expensive. Basically too late as the painting has commenced. [Ms Gorinski] essentially advised she needed to know what and when is due so that she may plan payment as the trust has run out of cash and needs to sell some equities. ...

[65] In evidence, Mrs Thurston apologised for her conduct in proceeding with the works to the Auckland property without trustee approval and said that she had made an error of judgment. Mrs Thurston gave evidence that the scope of the works and

¹³ Ibid, Exhibit "A" at 14.

¹⁴ Ibid, Exhibit "A" at 24.

therefore the costs escalated because the builder uncovered underlying problems not previously known about, and those problems then had to be rectified. Mrs Thurston rejected suggestions put to her to the effect that Ms Gorinski and Mr Burrett had been as opposed to the works at the relevant time. The gist of Mrs Thurston's evidence was that the evidence of those trustees exaggerated the opposition they had expressed at the time. Mrs Thurston also pointed to the valuer's opinion as to an increase in the market value of the property as a result of the works and said, correctly, that all trustees agreed some works were required.

[66] In evidence Mr Goodwin said he did not consider the trust fund was disadvantaged by the works because of the commensurate increase in the market value of the property anticipated by the valuer. That statement ignores the facts that now a substantially greater proportion of the capital of the trust fund is invested in the Auckland property, that some of the works at least will be of a wasting nature and that no income can be earned from the capital that has been used to pay for the works.

[67] Whatever Mrs Thurston's apology and the valuer's opinion, she acted without the trustees' approval, in breach of their decision to consider the matter further and the effect of her actions has been to reduce the funds that might be invested to earn income. Mrs Thurston authorised substantial works to a trust asset of which she has the sole use. When giving evidence, counsel for the Plaintiff put it to Mrs Thurston that she had not considered the interests of the Group B Beneficiaries in authorising the works. Mrs Thurston responded that she had just lost her husband and she accepted that she had not considered the interests of the Plaintiff and his sons.¹⁵

[68] A trustee must be able to carry out their duties for the benefit of all beneficiaries. Those duties include a duty to act impartially as between all beneficiaries. By the actions to which I have referred, Mrs Thurston has demonstrated that she does not understand the need to, or is unwilling to, separate her obligations as a trustee from her interests as a beneficiary and that she cannot perform the duty to which I have referred.

¹⁵ Notes of Evidence at 186.

Other disputes/matters

[69] Other disputes have emerged between the trustees.

[70] First, Mr Burrett's view is that the trustees have power to sell the Auckland property and purchase a substitute property in which Mrs Thurston would have a life interest. His view is that this should be considered and, if the property were sold, any surplus funds would then be invested and applied in accordance with cl 3.3 of the trust deed. Mr Goodwin's view is that the trustees do not have power to sell the Auckland property in the absence of Mrs Thurston's consent as the life tenant. Mr Goodwin obtained an opinion from counsel confirming his view, but Mr Burrett does not accept that opinion is correct.

[71] Secondly, there is disagreement as to whether the trustees have a duty or power to pay expenses incurred in the day to day running of the Auckland property and of Sanctuary Cove. These include costs such as rates, insurance, security costs and electricity. Sanctuary Cove is not an asset owned by the trust. Mr Burrett's view is that there may be power to pay expenses associated with Sanctuary Cove pursuant to cl 3.3(c) of the trust deed but not otherwise. Mr Goodwin has a different view. The trustees agreed to obtain legal advice on the matter but Mrs Thurston subsequently declined to proceed with obtaining that opinion. Mr Goodwin's evidence was that the cost of the various proceedings was becoming exorbitant and that the obtaining of the opinion was an unnecessary expense.

[72] Thirdly, the Plaintiff referred me to the manner in which Mr Goodwin has advised the executors of the estate as further evidence that he is not impartial as between all beneficiaries.

[73] One matter to which the Plaintiff referred was the executors' distributions of the estate within six months of the date of probate. These distributions included payment of the legacies to the Plaintiff and charities and a substantial sum (more than \$1 million) to Mrs Thurston in part payment of her legacy. An executor who distributes all or part of an estate before the expiration of six months from the grant

of probate may incur personal liability if notice of a claim is given with the six month period.¹⁶

[74] The unchallenged evidence of Ms Gorinski and Mr Burrett is that Mr Goodwin did not advise them of the risk of making such distributions. Ms Gorinski's and Mr Burrett's view was that Mr Goodwin refrained from advising them lest they refuse to make any distribution including to Mrs Thurston within the six month period. Mr Goodwin's evidence is that, in reality, the risk did not arise given the amount of the debt due from the trust. Mr Goodwin states that he was satisfied that the estate would not be compromised or fully distributed by the distributions.¹⁷

[75] The Plaintiff also referred me to the nature of Mr Goodwin's response to communications from the Plaintiff's solicitors.

[76] As I have said, on 8 June 2011 the Plaintiff's solicitors notified Mr Goodwin that the Plaintiff and his sons proposed to make a claim pursuant to the FPA. Mr Goodwin informed the executors of his receipt of this notice of claim at their meeting on 28 June 2011.

[77] Mr Burrett and Ms Gorinski's recollection was that Mr Goodwin advised the executors that the Plaintiff's solicitors' letter was "just noise", and that they should arrange to transfer Sanctuary Cove to Mrs Thurston and complete payment of any outstanding bequests "as quickly as possible".¹⁸ Their evidence was that the executors accepted this advice and Sanctuary Cove was transferred to Mrs Thurston in August 2011. For his part, Mr Goodwin thought it more likely he had said the letter was "an opening salvo".¹⁹ Regardless, advice to expedite rather than halt distributions in such circumstances can only be considered unusual.²⁰ Mr Goodwin's evidence was that, by the time the Plaintiff served his proceedings under the FPA, some \$1.78 million of Mrs Thurston's legacy had been paid to her, and all other legacies and bequests (excluding those to the Plaintiff's sons) had been paid in full.

¹⁶ Administration Act 1969, s 47(4).

¹⁷ Notes of Evidence at 257.

¹⁸ Affidavit of J S Burrett sworn 25 May 2012, at [32].

¹⁹ Notes of Evidence at 256.

²⁰ Administration Act 1969, s 47(4).

[78] Another example to which the Plaintiff referred arose from a request by the Plaintiff for information. The relevant extract from the minutes of a meeting of executors on 12 July 2011 states:²¹

There has been further correspondence from [the Plaintiff's solicitors] re [the Plaintiff and his sons]. Required are all the financial accounts from inception of the Trust and [Ms Gorinski] is to attend to this. The beneficiaries requesting this information should be paying for this and an invoice will be sent accordingly via [Mr Goodwin's firm]. The legal representatives for [the Plaintiff] and sons also requested costing for [the Auckland property] renovations and as to whether payment was coming from income or capital of the Trust to meet these. ...

[79] Also, in response to correspondence from the Plaintiff's solicitors, Mr Goodwin replied on behalf of the trustees in an email dated 17 November 2011 saying:²²

... In the 7th November letter you refer in paragraph 7 to no enquiry having been made yet into the circumstances of [the Plaintiff] and his sons. The trustees are about to review the financial accounts to 31 March 2011 and it would assist the present Thurston Family Trust trustees in the exercise of their duties as listed in paragraph 6 to have information in the form of individual statements of financial positions for [the Plaintiff and each of his sons] as at 31 March 2011 together with the same year end financial statements for all trusts established for their benefit.

You will no doubt agree it will be very difficult for the present trustees to make any assessment of their needs without that information to hand. It should be remembered that this will be the first opportunity for the present trustees to consider the position of your clients family since the death of [Mr] Thurston, in the time since his death the executors of his estate have paid a \$200,000 legacy to [the Plaintiff] well ahead of the expiry of the "executors" year.

[80] Neither the Plaintiff nor his sons provided such information to the trustees. The important matter for present purposes, however, is that the trustees' request for such financial information contrasts with the manner in which they have applied trust funds for the benefit of Mrs Thurston.

[81] I accept the Plaintiff's submission that these various matters evidence that Mr Goodwin is so closely aligned to Mrs Thurston's interests as a beneficiary of the

²¹ Affidavit of J S Burrett sworn 25 May 2012, Exhibit "A" at 23.

²² Affidavit of L G Thurston sworn 13 April 2012, at [76].

trust that he has not acted impartially as between all beneficiaries and that he cannot so act.

Conclusion

[82] The present position is that the trust has applied substantial sums to works to the Auckland property, has applied sums to pay running expenses of the Auckland property, has paid fees charged by all trustees (excluding Mrs Thurston) for their attendances, and has paid for legal and accounting advice and attendances. As yet, however, no distribution from the trust fund has been made for the benefit of the Plaintiff or any of his sons.

[83] For the reasons given in [68] and [81], I am satisfied that it is necessary for the proper execution of the trust that Mrs Thurston and Mr Goodwin be removed as trustees. I make orders accordingly. I reserve leave to apply to the parties if any further orders are required, consequential on these orders to remove.

Costs

[84] It may be possible for the parties to agree costs. If not, the Plaintiff may submit a memorandum by 4 pm, 16 August 2013 and the Defendants may reply within two weeks thereafter.

.....
M Peters J